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No. 87-1400

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALBERTO CLAUSELL and PATRICIA CLAUSELL,
Appellants,

vs.

HOBART CORPORATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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QUESTION PRESENTED FOR REVIEW

Whether Florida's statute of repose, § 95.031(2), Fla. Stat. (1985), was violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, when retroactively applied to divest the plaintiffs of a cause of action for personal injury which was not barred by the statute either at the time the cause of action arose, or at the time the action was filed.

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Appellants Alberto and Patricia Clausell respectfully oppose appellee Hobart Corporation's motion to dismiss the instant appeal. The substance of our position is outlined in the Jurisdictional Statement; we offer the following points in reaction to the specific arguments raised by Hobart:

This Court Has Jurisdiction Under 28 U.S.C. § 1257(2).

Hobart's sole contention is that the Clausells' hopes were lost not by the application of a statute, but by the action of a court, which in turn applied not a statute, but a common-law, judge-made rule that previously-invalidated statutes which are resurrected should be considered valid *ab initio*. But the court employed that rule to enforce a statute, and it was the application of that

statute which divested the Clausells of their cause of action. The *Pullum* decision[1] neither created nor enforced a judge-made rule of substantive law; it upheld a statute. The *Clausell* decision (A1) neither created nor enforced a judge-made rule of substantive law; it applied and enforced a statute. It was a court which did that—not an executive officer—and it did so in part through judge-made rules—but the sole effect of its decision was to apply the statute to the Clausells' cause of action, and the Clausells' sole contention is that the statute is unconstitutional as so applied.

As we noted (Jurisdictional Statement at 12 & n.3), this Court has "held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 440-41 (1979). That standard is satisfied not merely by the incantation of "some abracadabra," *Flournoy v. Wiener*, 321 U.S. 253, 264-65 (1944) (Frankfurter, J., dissenting), but also when "the question was necessarily decided, notwithstanding the failure or refusal of the state court to expressly and in terms pass upon the matter . . .," *Harding v. State of Illinois*, 196 U.S. 78 (1904)—that is, when it is "impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the State Court." *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 249 (1829).

In this context, it is not enough to protest (motion to dismiss at 5) that the question certified to the Florida

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1. *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

Supreme Court "did not raise the issue of the constitutional validity of the statute of repose," and that the "Florida Supreme Court merely rejected appellants' assertion of a federal property right and held that the *Pullum* decision had rendered the statute valid *ab initio* notwithstanding *Battilla*."[2] Hobart's job was to suggest some theory under which the Florida Supreme Court could have "merely rejected" that contention without necessarily upholding the application of the statute against constitutional challenge. As we emphasized, such an explanation is inherently impossible, and Hobart has not even attempted one. Since the Florida Supreme Court's decision necessarily applied the statute despite the Clausells' contention that to do so would violate their federal constitutional rights, this Court has jurisdiction under 28 U.S.C. § 1257(2).

This Case Presents a Substantial Federal Question.

Surprisingly, Hobart's primary position is not that the federal question is settled or insubstantial, but that there is no federal question at all. Hobart argues that "the determination of the retroactive application of state-court judicial decisions is for the court rendering the decision; federal constitutional law has no say in the retroactivity of such decisions" (motion at 6); that Florida's rule is that a resurrected statute is considered valid *ab initio* (motion at 6-8); and that "[a]ppellants clearly could have no federally protected property right in a claim which was non-existent under state law" (motion at 8). This suggestion proves far too much; it would

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2. *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980) (per curiam).

wipe out 100 years of federal constitutional law. It is "true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws . . .," but "while it is for the State courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680-81 (1930). The federal guarantee of due process would be fragile, indeed, if the State could avoid it by simply declaring retroactively that a right which it once acknowledged never really existed at all. As Justice Stewart wrote, "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). The Florida Supreme Court has recognized this principle, holding that "[w]here a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision retrospective operation." *Florida Forest and Park Service v. Strickland*, 18 So.2d 251, 253 (Fla. 1944).

This observation serves to answer Hobart's back-up contention (motion at 9-10) that if there is "no constitutional infirmity in the statute of repose itself," "[i]t logically follows that there is likewise no impairment of any due process rights when the same claim is extinguished through application of Florida's decisional law, which views the statute of repose as valid *ab initio* . . . ."

To the contrary, "[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976), *quoted in Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717, 730 (1984) ("[R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects"). *See United States v. Locke*, 471 U.S. 84, 105 (1985); *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. at 733, *quoting Welch v. Henry*, 305 U.S. 134, 147 (1938) ("retroactive application" impermissible if "so harsh and oppressive as to transgress the constitutional limitation"), *also quoted in United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977).[3] Thus, as we emphasized (Jurisdictional Statement at 21), a governmental action which may be constitutionally-unobjection-

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3. Moreover, the rationality of a statute's application must be assessed at least in part by reference to the "form of property" interfered with, *Best v. Humbolt Placer Mining Co.*, 371 U.S. 334, 335 (1963), *quoted in United States v. Locke*, 471 U.S. 84, 104 (1985), and the "form of property" may be significantly different in the case of retroactively-applied legislation. The Clausells are in a very-different position from those who may have suffered a personal injury after the statute of repose was resurrected in *Pullum;* the Clausells were divested not of an inchoate right to bring an action which might arise in the future, but of an action which already had arisen. *See infra.* They had filed their cause of action in a jurisdiction which had no statute of repose (because it had been declared invalid), and they relied upon that state of law by hiring counsel and incurring the cost of litigation. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) (reliance a relevant factor). And they were divested of that cause of action by an unexpected change of the law of which they had no notice. *See Cohan v. Commissioner*, 39 F.2d 540, 545 (2d Cir. 1930) (Hand, J.), *quoted in United States v. Darusmont*, 449 U.S. 292, 298, 300 (1981) (per curiam). These considerations inhere in the retroactive application of legislation, and may be wholly inapplicable to its facial validity.

able in the abstract may nonetheless be impermissible when applied retroactively to disturb pre-existing rights.[4]

Perhaps because of these authorities, Hobart advances the tertiary position (motion at 11-12) that property rights of constitutional dimension may be found in contracts, as in *Coombes v. Getz, supra* note 4, but not in "any rule of common law or in any tort claim." These provide "a mere expectation based on an anticipation of the continuance of an existing law"—not "a title, legal or equitable, to the present or future enforcement of a demand." But that could be said of the prospective right to bring an action for employment discrimination, which the Court considered in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), holding that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"; or of the prospective divorce action in *Boddie v. Connecticut*, 401 U.S. 371 (1971), which the Court acknowledged in *Logan* to be a property right of constitutional dimension, although it "may not be a prop-

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4. *See generally Mullaney v. Wilbur*, 421 U.S. 684, 690 n.10 (1975) ("the retroactive application of the new interpretation was itself a denial of due process"); *Bouie v. Columbia*, 378 U.S. 347, 354 (1964) ("When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right' "), *quoting Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-81 (1930) (while "[i]t is true that the courts of a state have a supreme power to interpret and declare the written and unwritten laws of the state," "a state may not deprive a person of all existing remedies for the enforcement of a right"); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940) (federal statute may have conferred property rights before declared invalid); *Coombes v. Getz*, 285 U.S. 434, 442 (1932) (contract created under old law survived its repeal); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 371 (1910) (same); *Gelpcke*

(Continued on following page)

erty interest in the same sense as a tort or a discrimination action." 455 U.S. at 430 n.5. As we noted (Jurisdictional Statement at 22), the *Logan* Court rejected the suggestion made here by Hobart, holding that "[a] claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State," and his right to seek it "presumably can be surrendered for value . . . ." 455 U.S. at 432.

Hobart deals with *Logan* and *Boddie* not by adhering to its position that a tort claim is too inchoate to warrant constitutional protection, but by shifting to a fourth position (motion at 12-14)—that the governmental restrictions in *Logan* and *Boddie* were so "arbitrary and irrational" that they failed to justify the barriers to the litigants' access to court. That is equally true in the instant case, notwithstanding Hobart's suggestion (motion at 15) that the statute's purpose would be undermined if it failed to reach the largest possible number of cases—a suggestion which would uphold the retroactive application of all legislation. The Florida Supreme Court's application of the statute in the instant case was wholly irrational even from Hobart's perspective, because the statute already had been repealed at the time of that application (*see* Jurisdictional Statement at 5). At that time, there was no governmental interest of any nature to be balanced against the Clausells' constitutional rights, and thus no conceivable rationality to the statute as applied.

Footnote continued—

v. Dubuque, 68 U.S. (1 Wall.) 175, 17 L. Ed. 520 (1863) (bonds issued under apparent legislative authority were valid notwithstanding a subsequent state supreme-court decision that the legislature had no power to issue them).

CONCLUSION

For the reasons provided above, it is respectfully submitted that the appellee's Motion to Dismiss Appeal should be denied, and that this Court should note probable jurisdiction of this appeal.

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